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Noteworthy:

"I think the President, the administration has made the right decision to release those papers from the White House Counsel's Office, that would allow an openness into those papers that are in the archives, but stopping at the deliberative briefs that are part of the Solicitor General's Office."

"I might add that a number of Solicitor Generals of the past, Democrat and Republicans, have said that it would be unwise to start releasing the deliberative memos, because they are under an attorney- client privilege and most certainly have advocacy and making arguments for and against certain issues as a way to decide if the government is going to, in fact, join an appeal."

-Senator Hutchison, 7/26/05, Media Availability

"With respect to starting the day after Labor Day, that is a possibility. But the other date which is under consideration is August the 29th. And our duty is to have a justice seated by the first Monday in October, which is October 3rd."
-Senator Specter, 7/26/05, Media Availability

"It is, because you're asking the nominee for something he doesn't have and that he could not ethically give. The American Bar Association recognizes, the courts have confirmed, that a lawyer has a responsibility toward a former client not to divulge deliberative memos and, in this case, from the solicitor general's office. And so it's really a request that Judge Roberts himself can't fulfill. So it's really not fair."
-Senator Cornyn, 7/26/05, *Fox, Hannity and Colmes*

Roberts Is the Right Kind of Conservative
July 27, 2005
By Norman Ornstein,
Roll Call Contributing Writer

In 1999, as the Independent Counsel Statute was set to expire, Tom Mann of the Brookings Institution and I were summoned to meet with former Senate Majority Leaders George Mitchell (D-Maine) and Bob Dole (R-Kan.), who were then practicing law at the same firm in Washington. As leaders, they had taken different positions on the act — Dole had opposed it, and Mitchell had supported it — but both saw the

need to replace it with something that fixed its awful excesses while saving the idea of independent investigations of scandal and wrongdoing in government.
We set up a joint American Enterprise Institute/Brookings Project on the Independent Counsel Statute, co-chaired by Dole and Mitchell and co-directed by Mann and me. We hired the estimable Michael Davidson, longtime counsel to the Senate, as counsel to the project and brought in a talented young lawyer named Elaine Stone to assist him. Most importantly, we convened a working group of eight of the best and brightest Washington hands, with the widest range of experience and backgrounds in all the branches, to work with us, analyzing the history, tradeoffs and alternative options in exhaustive detail.

The eight we chose were Zoe Baird, Drew Days, Carla Hills, Bill Paxon, David Skaggs, Dick Thornburgh, Mark Touhey and John Roberts, someone I had not known prior to this experience. We all worked very hard, and I had a chance to see Roberts up close and measure him up against seven other extraordinary talents. The conclusion I came to at the time was the same conclusion as everybody who has worked with Roberts professionally or who has known him personally — that he is brilliant, nice, conscientious, conservative and not a rigid ideologue.

I was curious to see Roberts up close and work with him; he had developed a strong reputation as deputy solicitor general. He was an obvious candidate for a prime position on the federal bench in a future Republican administration. But we weren't looking at him as a future Supreme Court nominee, just as a contributor to a project with tough legal, constitutional, historical and moral issues to grapple with. And he came through like a champ.

When President Bush chose a Supreme Court nominee, the only realistic choice he was going to make was between a conservative who could get 60 to 80 votes or more, and a conservative who would get 49 to 51 votes. The options that fit the former category were characterized by depth, prudence and a genuinely narrow view of the role of the courts. At the other extreme are some conservatives who have an activist and combative approach that starts with ideology and then works to make decisions fit into their ideological framework. For these judges or judicial candidates, the expressed judicial deference to the legislative branch holds when the legislature makes decisions they like, but somehow does not apply for decisions they don't.

I saw an interesting juxtaposition of the two types when a three-judge panel of three federal judges considered the Bipartisan Campaign Reform Act. One conservative district judge, Richard Leon, read the record carefully, thoroughly and objectively. While he did not uphold every part of the law, he understood that Congress had worked faithfully to apply the Supreme Court's framework in the landmark case Buckley v. Valeo, using systematic research and deliberation to craft a bill. He carefully examined each piece of the law in that vein.

By contrast, another conservative judge on the D.C. Circuit, Karen LeCraft Henderson, showed no patience for carefully examining the record during oral arguments or in her dissenting opinion. She came to the case with preformed conclusions and wrote an intemperate dissent.

John Roberts is no Karen LeCraft Henderson. I believe that he will be modest, as he says, and will treat cases with appropriate deference to other branches. I think he has a clear capacity to see each side of an issue, and not to use a rigid framework to draw his conclusions.

I am delighted that Bush has chosen this type of conservative for the Supreme Court. If Democrats are smart, they will give Roberts a thorough grilling during his hearing, let him get 80-plus votes on the Senate floor, and congratulate the president for choosing the right kind of nominee, while telling him they expect another such 80/20 candidate, and not a 51/49 type, the next time around as well.

Remembering Paul Duke

I had expected this week's column to be simply about John Roberts. But then Paul Duke died, and I was moved to add another element.

It seems like centuries ago, but in the mid- and late-1970s, the only real television outlet for intensive coverage of public affairs was public broadcasting. There was no C-SPAN yet, no CNN or any other 24-hour cable news outlet. Starting with the gavel-to-gavel coverage of the Watergate hearings, every major Congressional event, from Supreme Court confirmations to civil service reform to investigative hearings, was left to PBS to cover. And cover it PBS did, almost always anchored by Paul Duke.

Through many of these events, I was privileged to be Paul's sidekick and expert analyst. We often went gavel-to-gavel. That meant long stretches when committees were in recess or sometimes in executive session. There were times when Paul and I had to fill extended gaps by ourselves. It became a stressful but wonderful chance to test the limits on our knowledge of Congressional history, anecdotes and thumbnail sketches of committee members and witnesses.

The record for us came during the Congressional investigation of Billy Carter, the brother of then-President Jimmy Carter who had some, shall we say, questionable dealings with Libya. At one point, Paul and I had to riff for more than an hour and a half. It worked, because Paul knew as much about Congress as anybody. He also cared deeply for the institution and its people, and he was a class act.

In the late 1970s, we started a show on Congress at WETA called "The Lawmakers." Paul was anchor, Linda Wertheimer and Cokie Roberts were the reporters, and I was political editor. We wanted to do a straightforward show about Congress, not one dipped in cynicism that blasted the institution and its Members at every turn. At a time when the Zeitgeist was anti-Congress, the show did not last. But I am proud of what we did, and I am proud of my association with Paul Duke. We could use him, and a thousand like him, now.